STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Court of Appeals and Circuit Court for the County of Oakland)

BOARD OF TRUSTEES OF THE CITY OF PONTIAC POLICE AND FIRE RETIREE PREFUNDED GROUP HEALTH AND INSURANCE TRUST,

Plaintiff/Appellee,

v.

CITY OF PONTIAC, MICHIGAN,

Defendant/Appellant.

SUP CT NO. 154745

COURT OF APPEALS NO. 316418

Oakland County Circuit Court
No. 12-128625-CZ

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN RESPONSE TO DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL [FROM COURT OF APPEALS' OPINION ON REMAND]

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STATEMENT OF ISSUES PRESENTED

I. DOES THE RETROACTIVITY ANALYSIS STATED IN LAFONTAINE SALINE, INC v CHRYSLER GROUP, LLC, 496 MICH 26; 852 NW 2D 78 (2014) APPLY TO EXECUTIVE ORDER 225; AND, IF SO, DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE EM'S EXECUTIVE ORDER, BY ITS OWN TERMS, OPERATED PROSPECTIVELY ONLY?

Plaintiff-Appellee and the Court of Appeals say "Yes."

Defendant-Appellant says "No."

The trial court did not directly address this threshold issue.

II. WOULD RETROACTIVE APPLICATION OF EXECUTIVE ORDER 225 VIOLATE ART IX, SEC.24 OF MICHIGAN'S CONSTITUTION?

Plaintiff-Appellee says "Yes."

Defendant-Appellant says "No."

The trial court and Court of Appeals said "No."

INTRODUCTION

This supplemental brief on behalf of Plaintiff-Appellee is filed pursuant to the following dictates of the Michigan Supreme Court, as set forth in its Order of June 9, 2017:

> On order of the Court, the application for leave to appeal the October 16, 2016 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). **The parties shall file supplemental briefs within 42 days of the date of this order addressing (1) whether the Court of Appeals correctly concluded that the principles from *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26 (2014), apply to the analysis of the Emergency Manager's Executive Order 225; and that (2) the retroactive application of EO 225 to extinguish the defendant city's accrued but unpaid contribution to the trust for the 2011-2012 fiscal year was impermissible under *LaFontaine*; and (3) if not, whether EO 225 constitutes an impermissible retroactive modification of the 2011-2012 fiscal year contribution under Const 1963, art 9, § 24.** The parties should not submit mere restatements of their applications papers
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> Order, 6-9-17, attached hereto as **Exhibit A** [emphasis added].

SUPPLEMENTAL ARGUMENT I

THE RETROACTIVITY ANALYSIS STATED IN LAFONTAINE SALINE, INC v CHRYSLER GROUP, LLC, 496 MICH 26; 852 NW 2D 78 (2014) APPLIES TO EXECUTIVE ORDER 225; THUS, THE COURT OF APPEALS CORRECTLY HELD THAT THE EM'S EXECUTIVE ORDER, BY ITSPLAIN LANGUAGE, OPERATED PROSPECTIVELY ONLY [CORRESPONDING TO ISSUES 1 AND 2 IN SUPREME COURT ORDER OF JUNE 9, 2017]

Executive Order 225 reads in pertinent part as follows:

> "Article III of the Trust Agreement, Section 1, subsections (a) and (b) are amended to remove Article III obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations. The Order shall have immediate effect."

Tc re-emphasize, in the briefs filed with the Michigan Supreme Court relative to Defendant's first Application filed in this action (Sup. Ct. docket no. 151717), **both parties** argued that the interpretation of the State of Michigan Emergency Manager's Executive Order

225, is governed by principles of statutory interpretation and application because the EM's authority is derived by statute. In this regard, former MCL 141.1519 set forth the enumerated powers of an emergency manager and granted the emergency manager the ability to reject or modify a contract, including a collective bargaining agreement. MCL 141.1519(1) (j), (k). **The Court should be mindful that Defendant has now completely reversed its position, out of apparent necessity.**

The Court of Appeals on initial remand agreed with Plaintiff's position that the interpretation of the Executive Order is governed by the standards of statutory interpretation and application set forth in *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26; 852 NW 2d 78 (2014) because the Michigan Supreme Court has required that executive orders be interpreted and applied under the same standards as those governing statutes. Applying the *LaFontaine* standards, the Court of Appeals on initial remand adopted the Plaintiff's position that Executive Order 225 applies only prospectively to contributions that were not yet due and unaccrued on the EO's effective date.

A. The Standards of *LaFontaine* Apply to EO 225.

In addition to the authority set forth in Plaintiff's Brief in Response to Defendant's Application for Leave to Appeal supporting this position (regarding the applicability of the *LaFontaine* standards to EO 225), the United Court of Appeals for the Sixth Circuit recently held that the power of the Emergency Manager under Public Act 4 to reject, modify or terminate terms of a Collective Bargaining Agreement is indeed a power of the Legislature:

> In our view, the terms of Public Act 4 make clear that the orders are an exercise of legislative power. Under the Act, the Emergency Manager had the facially unlimited authority to
> reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement. The rejection, modification or termination of 1 or more terms and conditions of an existing collective bargaining agreement under this subdivision is a

> legitimate exercise of the state's sovereign powers if the emergency manager and the state treasurer determine that [certain] conditions are satisfied . . .
> Mich. Comp. Laws § 141.1519(1)(k) (emphasis added).
>
> The Act gave the Emergency Manager the ability to adopt or amend ordinances and exercise any power "relating to the operation of the local government." M.C.L. § 141.1519(1)(dd)-(ee). The Act also provided the Emergency Manager with expansive authority to act "in place of local officials, specifically the Mayor and City Council." The Emergency Manager, just like the City Council, had legislative powers to pass ordinances and appropriate funds, it is therefore reasonable to construe the Emergency Manager's actions as "legislative" because he had been delegated identical responsibilities under the Act.

Welch v Brown, 551 Fed. Appx 804, 809 (6th Cir 2014) *Welch* further supports Plaintiff's position and the Court of Appeals' ruling on remand. Whether EO 225 is the equivalent of legislation, *Welch*, supra, or is, in any event, to be interpreted and applied under the same standards that apply to statutes, the standards governing the limited retroactive application of statutes set forth in *LaFontaine* apply to EO 225 in this action. The Court of Appeals' consistent ruling on initial remand must be affirmed.

B. The LaFontaine Standards Prohibit Retroactive Application of EO 225

On initial remand, the Court of Appeals below concluded that because the standards set forth in *LaFontaine Saline, Inc v Chrysler Group, LLC*, supra, controls, summary disposition must be granted in favor of Plaintiff because the language of EO225 did not sufficiently express a clear intent in specific, unambiguous terms that it apply retroactively to extinguish vested rights to overdue benefit payments.

To restate, the Supreme Court in *LaFontaine* articulated the strict, controlling standards -- and supporting rationale-- for determining whether legislation may be applied retroactively to alter pre-existing contractual rights:

> Retroactive application of legislation "'presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled

> transactions.'" We have therefore required that the Legislature make its intentions clear when it seeks to pass a law with retroactive effect. In determining whether a law has retroactive effect, we keep four principles in mind. First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute.
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> 496 Mich at 38-39 [footnotes with citations omitted].

LaFontaine was recently applied by the United States District Court for the Eastern District of Michigan in *Perlin v Time Inc.*, 2017 U.S. District LEXIS 21401 (docket no. 16-10635, 2-15-17). The Defendant in *Perlin* unsuccessfully sought to apply retroactively a statutory amendment to the Video Privacy Protection Act which added a requirement that claimants may sue for a violation of the Act only if they have suffered actual damages. The District Court held that the statutory amendment could not apply retroactively to bar preexisting claims because the amendment's language did not clearly call for retroactive application Id, at **10-12. Specifically, the District Court summarized examples of statutory language that was sufficiently specific in this regard:

> The first factor that the Court must consider is whether the language of Senate Bill 490 indicates that it is to have retroactive effect. Senate Bill 490 does not contain any express language indicating that it is to be applied retroactively. Thus, the first factor weighs against retroactive application. See Kia Motors, 706 F.3d at 739 ("[T]he Michigan Legislature 'knows how to make clear its intention that a statute apply retroactively,' so the absence of express retroactive language is a strong indication that the Legislature did not intend a statute to apply retroactively." (quoting *Brewer v. A.D. Transp. Exp., Inc.*, 486 Mich. *50,* 56, 782 N.W.2d 475 (2010)); *LaFontaine*, 496 Mich. At 39-40. This conclusion is confirmed by the fact that Senate Bill 490 contains a provision stating that Senate Bill 490 would take effect ninety days after enactment. See 2016 Mich. Pub. Act. No. 92, enacting § 1 ("This amendatory act takes effect 90 days after the date it is enacted into law."). As the Michigan Supreme Court has explained,

> "providing a specific, future effective date and omitting any reference to retroactivity supports a conclusion that a statute should be applied prospectively only." *Johnson v Pastoriza*, 491 Mich. 417, 432, 818 N.W. 2d 279 (2012) (quoting *Brewer v A.D. Transp. Exp., Inc.*, 486 Mich. 50, 56, 783 N.W. 2d 475 (2010)) (internal quotation marks omitted).
>
> ***
>
> If, as Defendant contends, the legislature had intended to clarify that past VRPA violations—including those that had generated lawsuits pending at the time of Senate Bill 490''s enactment—would no longer be actionable absent actual damages, the legislature would have explicitly said so. As Plaintiff points out, several cases cited by Defendant involve just this kind of express retroactivity language. See, e.g., *Dep't of Treasury*, 290 Mich. App at 366-67 (amending act not only stated that it was "curative and intended to prevent any misinterpretation," but also expressly provided that "[t]his amendatory act is retroactive"); *Doe v Dep't of Corr.*, 249 Mich. App. 49, 56, 641 N.W. 2d 269 (2001) (amending act stated that it was "curative and intended to correct any misinterpretation of legislative intent in the [previous] court of appeals decision in [the Doe case]" (emphasis added)); *Romein v Gen Motors Corp.*, 168 Mich. App. 444, 450-51, 425 N.W. 2d 174 (1988) (amending act specifically identified a Michigan Supreme Court decision that was "erroneously rendered," explained that the act was intended to be "remedial and curative," and expressly provided that it would apply retroactively); *In re Oswalt*, 318 B.R. 817, 822 (W.D. Mich. 2004), *aff'd*, 444 F. 3d 524 (6th Cir. 2006) (legislative history of the amending act contained language stating that the act would "reinstate[] the financing practices that existed in Michigan before" [a certain Sixth Circuit opinion interpreting the pre-amendment statute]" (internal quotation marks and citation omitted) (emphasis removed)); see also *Boelter*, 192 F. Supp. 3d 427, 2016 WL 3369541 at *4 ("The phrases 'curative' and 'intended to clarify' do not, as Defendant argues, unequivocally indicate that the amendments apply to pre-existing disputes. Absent additional qualifying language, it is just as likely that the terms denote the amendment's purpose for consideration in future applications of the law.").
>
> Id.

Consistently, to assure full protection of vested rights, EO 225 may not be construed as retroactively eliminating such rights unless, at a minimum, the directive contains specific language which "clearly manifests" an intent to require retroactive application to impair vested rights. *LaFontaine*, supra. **The Court of Appeals properly held that there is no language in Executive Order 225 which clearly states or otherwise manifests an intent that the Order**

shall be given retroactive application to eliminate the duty to pay overdue contributions and the corresponding vested rights of the participants.

Indeed, the controlling point remains that Executive Order 225 merely contains language removing the City's obligation "to continue to make contributions" to the Trust. As the Court of Appeals held on remand below, this language does not explicitly provide that it applies retroactively to eliminate vested rights by removing the City's duty to pay overdue, delinquent contributions. *Lafontaine, supra.* See also cases set forth in the *Perlin* passage above. As the Court of Appeals on remand observed, the executive Order does not "acknowledge with the required clarity the existence of accrued but unpaid obligations or state directly that such obligations were being retroactively removed". (Defendant's Exhibit 4, p.7) Nor, as a matter of law, may the Court validly uphold a "presumed" intent to apply the Order retroactively because enforcement of such a presumption, would, as in *Lafontaine*, eliminate Plaintiff's existing rights under the collective bargaining agreement. 496 Mich at 41-42.

Finally, the Supreme Court is again requested to be mindful of the dictate that when the Legislature provides a specific, immediate or future effective date and omits any reference to retroactivity, such reference supports the conclusion that the statute applies prospectively only. ["That the Legislature provided for the law to take immediate effect *upon its filing date*...only confirms its textual prospectively"]. *LaFontaine*, p. 40. As in *LaFontaine*, Executive Order 225 stated: "The Order shall have immediate effect." (Defendant's Exhibit 1). **As *in LaFontaine*, this statement further upholds prospective application only.**

The Court of Appeals analysis is complete, very straight forward and controlling; indeed, the controlling analysis of interpretation compels the denial of any affirmative relief to Defendant.

ARGUMENT II

RETROACTIVE APPLICATION OF EXECUTIVE ORDER 225 WOULD VIOLATE ART. IX SEC.24 OF MICHIGAN'S CONSTITUTION. [CORRESPONDING TO ISSUE 3 IN SUPREME COURT ORDER OF JUNE 9, 2017]

The Michigan Supreme Court also authorized the parties to address the following consideration:

> (3) [w]hether EO 225 constitutes an impermissible retroactive modification of the 2011-2012 fiscal year contribution under Const 1963, art 9, § 24.

Michigan's Const.1963, Article 9 §24 provides as follows:

> Public Pension Plans and Retirement Systems. Obligation. The *accrued financial benefits* of each pension plan and retirement system of the State and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> Financial benefits, annual funding. Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

Under this provision, "accrued financial benefits" of a public retirement system pension plan are a contractual obligation that cannot be diminished or impaired. This section of the Constitution requires that benefits arising out of account of service rendered in each year be funded during that year, and thereafter.

In this appeal, Plaintiff has repeatedly contested the applicability of *Studier v Michigan Public Schools Retirement Board,* 472 Mich 642; 698 NW 2d 350 (2005) because, unlike in *Studier*, this action involved an impairment of contractual rights derived from a collective bargaining agreement.

In *Studier*, the lawsuit was brought by a class of retired school employees challenging increases in the prescription drug co-payments and deductibles within their retirement plan.

Plaintiffs asserted that the increases violated. Const.1963, Article 9 §24. A divided Michigan Supreme Court rejected the claim by holding in part held that the term "accrued financial benefits" refers only to benefits that increase over time, such as retirement benefits. On the question of what constitutes an "accrued financial benefit," the *Studier* majority held that in order to be an accrued benefit, that benefit must increase from year to year as does monthly cash retirement benefits, but not health benefits. The Court also held that health insurance benefits were not "financial benefits" as they did not involve the payment of a monetary sum. 472 Mich at 656-657.

Plaintiff here now challenges the validity of this holding in *Studier* and requests the Supreme Court to closely re-examine and overturn *Studier*. In this regard, the Supreme Court stated in *People v Tanner*, 496 Mich 199, 251; 853 NW2d 653 (2014):

> When questions before this Court implicate the Constitution, this Court arguably has an even greater obligation to overrule erroneous precedent. . . . This is because the policy of stare decisis is at its weakest when we interpret the Constitution because our interpretation can be altered only be constitutional amendment or by overruling our prior decisions. [Id. (quotation marks and citations omitted.)]
>
> 496 Mich at 251.

Studier is erroneous for the following reasons.

First, in construing the term 'accrued financial benefits" *Studier* adopted the financial definition of the word "accrued", as meaning an asset which increases in value over time, while acknowledging but rejecting without explanation the definition in the legal context:

> At the time that our 1963 Constitution was ratified, the term "accrue" was commonly defined as "to increase, grow," **"to come into existence as an enforceable claim; vest as a right,"** "to come by way of increase or addition: arise as a growth or result," "to be periodically accumulated in the process of time whether as an increase or a decrease," "gather, collect, accumulate," *Webster's Third New Int'l Dictionary* (1961), p 13, or "to happen or result as a natural growth; arise in due course; come or fall as an addition or increment," **"to become a present and enforceable right or demand,"** *Random House*

> *American College Dictionary* (1964), p 9. Thus, according to these definitions, the ratifiers of our Constitution would have commonly understood "accrued" benefits to be benefits of the type that increase or grow over time-such as a pension payment or retirement allowance that increases in amount along with the number of years of service a public school employee has completed. Health care benefits, however, are not benefits of this sort. Simply stated, they are not accrued.
>
> Id, at 653-654 [emphasis added]..

Studier thus acknowledged two commonly understood definitions for the term "accrued" at the time the constitutional provision was passed in 1960: the definition in the financial context (an asset which has increased in value) and the definition in the legal context (e.g. an enforceable right or claim). However, *Studier* inexplicably adopted the meaning of the term as used in the financial context, but not the meaning used in the legal context. There was no explanation for that omission.

It is well recognized that the definition of the term "accrued" rejected by *Studier* -- an enforceable right or claim -- is considered the "the most common and natural use of the term". *Frazier v City of Chatanooga*, 841 F. 3d 433 (6th Cir 2016), citing *Gabelli v SEC* 133 S. Ct. 1216 (2013). The command of Art 1X, Sec 24, that "accrued financial benefits" shall not be diminished or impaired, only makes sense if this "most common and natural use of the term" is utilized. There is no logical reason to interpret that provision as permitting the impairment of benefits that do not necessarily increase in value through time.

Likewise, contrary to the ruling of *Studier*, the modifying adjective "financial" should not disqualify health care benefits from the reach of the constitutional protection simply because those benefits are not paid in the form of cash. Justice Cavanaugh's dissent in *Studier* is instructive:

> Whether health care benefits are "accrued financial benefits" has already been addressed by this Court in *Musselman v Governor*, 448 Mich. 503, 510, 533

N.W. 2d 237 (1995) (Musselman I), and Musselman v Governor (On Rehearing), 450 Mich. 574; 545 N.W.2d 346 (1996) (Musselman II). In Musselman I, this Court examined whether health care benefits are indeed "financial" benefits. We held that because the purpose of the constitutional provision is to prevent the state from amassing bills for pension payments, including health care benefits, for which the state does not have the money to pay, the term "financial benefits" includes retirement health care benefits.

Reflecting on the analysis in Musselman I, I fail to see its flaws. This Court reasonably concluded that the goal of the constitutional provision is to ensure that the state can pay for the commitments it has made. Regardless of whether the commitment is for a straightforward monthly cash allowance to a retiree or for payment of health care benefits for a retiree, the state must still pay for its obligations. If the state has failed to set aside an appropriate amount of money, the situation is still the same, meaning the state still has a financial consequence.

I believe this interpretation is the one that the people gave the constitutional provision when it was adopted because it best reflects the common understanding of the people. See *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 745; 330 N.W. 2d 346 (1982). The most reasonable interpretation of the phrase "accrued financial benefits" includes health care benefits. Health care benefits are given in lieu of additional compensation to public school employees. A health care benefit is a financial benefit because it clearly costs the state money and has an economic value to the employee. Notably, our Constitution was not written to include every conceivable aspect of a pension plan. It was certainly not beyond the understanding of the ratifiers that health care benefits, which cost the state money, would be offered as a retirement benefit. As such, these benefits would need to be protected, just as monthly cash allowances to retirees must be protected.

As we stated in Musselman I, supra at 516 n 12, "Many delegates to the 1961 Constitutional Convention perceived as unfair the rule that pensions granted by public authorities were not contractual obligations, but rather gratuitous allowances that could be revoked at will." See, e.g., 1 Official Record, Constitutional Convention 1961, pp 770-774. It should not come as a surprise that the ratifiers would believe this to be true about health care benefits that mean as much, if not more, to many retirees.

Moreover, even if the ratifiers did not imagine every conceivable pension plan benefit that would be offered, the "idea behind formulating a general rule, as opposed to a set of specific commands, is that a rule governs possibilities that could not have been anticipated at the time." Musselman I, supra at 514. The constitutional provision was meant to address all public employee retirement systems; it is entirely reasonable that the ratifiers would not be aware of every possible retirement benefit being offered to every public employee. See, e.g., 1 Official Record, Constitutional Convention 1961, p 771. In response to a

> question whether the state could increase benefits and whether an increase in benefits would be a gratuity or an obligation that the state must fulfill, a constitutional convention delegate responded as follows: "Certainly there's nothing here to prohibit the employer from increasing the benefit structure." Id. at 774. "Once the employee, by working pursuant to an understanding that this is the benefit structure presently provided, has worked in reliance thereon, he has the contractual right to those benefits which may not be diminished or impaired." *Id.*
>
> The constitutional principle declared is that accrued financial benefits, including health care benefits, will be protected for retirees. Simply, "once an employee has performed the service in reliance upon the then prescribed level of benefits, the employee has the contractual right to receive those benefits under the terms of the statute or ordinance prescribing the plan." Id. at 771.
>
> Id, at 674-675.

In the event that the Supreme Court is compelled to review the constitutional issue, Plaintiff respectfully submits that the Michigan Supreme Court reexamine *Studier*, *Musselman v Governor*, 448 Mich. 503, 510; 533 N.W.2d 237 (1995) (*Musselman I*), and *Musselman v Governor (On Rehearing)*, 450 Mich. 574; 545 N.W.2d 346 (1996) (*Musselman II*). Health benefits are of a financial benefit to the retired employees intended to be protected by the underlying CBA and Article IX, Sec. 24. Those benefits most certainly have a monetary value, even if they are not paid to the retired employees in the form of cash payments. Consistently, Plaintiff submits that the more persuasive reasoning is that supporting the majority opinion in *Musselman I* and the dissenting opinion in *Studier*.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee respectfully requests that this Honorable Court deny leave to appeal

Respectfully submitted,

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Dated: 8/4/2017
W2023154.DOC